Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1134

ISADORE GOLDMAN,
PETITIONER,

v.

SEARS, ROEBUCK & COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the
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OCTOBER TERM, 1979

No.

ISADORE GOLDMAN,
PETITIONER,

v.

SEARS, ROEBUCK & COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Isadore Goldman, Petitioner, respectfully petitions for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the First Circuit, entered on October 25, 1979, in which the Court affirmed a District Court decision dismissing this action for failure of the Petitioner to timely file a claim under Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. Sections 2000e *et seq.* and for failure of the Petitioner to timely file a Notice of Intent to Sue in accordance with Section 626

(d)(1) of the Age Discrimination in Employment Act, Title 29 U.S.C. Section 626(d)(1).

Opinions Below

The decision and order of the United States District Court for the District of Massachusetts is not reported (Appendix A, *infra,* pp. A-1 - A-8). The opinion for the United States Court of Appeals for the First Circuit is reported at 607 F.2d 1014 (Appendix B, *infra,* pp. A-9 - A-19).

Jurisdiction

The opinion of the Court of Appeals was filed on October 25, 1979.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254(1).

Questions Presented

1) Whether the 180 day period for filing a charge with the EEOC is a substantive jurisdictional prerequisite to suit.

2) Whether an EEOC determination that "the timeliness, deferral, and all other jurisdictional requirements have been met" is sufficient as a matter of law to withstand a Motion to Dismiss on any of those grounds.

3) Whether a factual pattern constituting "continuing violation" can be decided as a matter of law.

4) Whether a District Court can determine that a factual pattern alleged in the Complaint does not amount to a "continuing violation" in view of a determination by the EEOC that a charge was "timely" filed on a Motion to Dismiss.

5) Whether the Complaint sets forth a cause of action upon which relief can be granted.

Statutes Involved

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. Sections 2000e and Section 626 of the Age Discrimination in Employment Act, Title 29 U.S.C. Section 626. The text of those statutes are set forth respectively in Appendix C, *infra,* and Appendix D, *infra.*

Statement of the Case

The Petitioner, Mr. Goldman, was employed by the Respondent, Sears, Roebuck & Company, on March 30, 1962, in their large appliance department store at their Saugus, Massachusetts location. Mr. Goldman continued to work in that department until 1972. In 1972 there was a substantial change in management personnel and, as a result, Mr. Goldman was subjected to harassment and other discriminatory treatment by these new management personnel.

On July 27, 1973, Mr. Goldman was transferred to the Shoe Department at a substantial loss of income. The work in the Shoe Department also aggravated a pre-existing lower back condition. Sometime late in 1974 or early in 1975, Mr. Goldman was transferred from the Shoe Department to the Electrical Department and suffered an additional loss of income.

Mr. Goldman made repeated requests to be transferred back to the Large Appliance Department but Sears had continuously refused.

Mr. Goldman believed that these demotions and repeated refusals to place him in his original position in the Large Appliance Department were due to his age and his religion.

On July 16, 1976, Mr. Goldman filed a charge in writing with the Equal Employment Opportunity Commission complaining that the actions taken against him by Sears were

taken against him solely because of his religious beliefs and his age. On October 13, 1977, the EEOC found that "the timeliness, deferral, and all other jurisdictional requirements have been met . . ." and that "based on the evidence of record, there is reasonable cause to believe that Respondent (Sears) discriminated against Charging Party (Goldman) in the manner alleged, in violation of Title VII of the Civil Rights Act of 1964, as amended". On March 6, 1978, Mr. Goldman was notified by the EEOC that it was unable to obtain voluntary compliance on the part of Sears by informal methods of conference, conciliation, and persuasion and that Mr. Goldman had 90 days from the date of the receipt of that letter to bring a civil action in the United States District Court.

On March 29, 1978, Mr. Goldman filed a suit against Sears for discriminatory employment practices in violation of the Age Discrimination in Employment Act of 1967, Title 29 U.S.C. Section 626, and Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. Section 2000e-5. Mr. Goldman alleged in his Complaint that "all conditions precedent to jurisdiction under Title 42 U.S.C. Section 2000e-5 has occurred or been complied with, to wit: A charge of employment discrimination was filed with the Equal Employment Opportunity Commission within 180 days of the Commission of the Unfair Employment Practice; a notification of right to sue was received from the Equal Employment Opportunity Commission on March 6, 1978 . . . ; this Complaint has been filed within 90 days of receipt of the notification of right to sue."

On May 15 1978, Sears filed a Motion to Dismiss on five grounds:

(1) That the Plaintiff filed his charge with the Equal Employment Opportunity Commission more than 180 days after the alleged unlawful employment practice occurred.

(2) That the Plaintiff failed to file a claim of unlawful discriminatory practices because of religion with the Equal Employment Opportunity Commission within 180 days of the alleged unlawful employment practice.
(3) That the action is barred by 29 U.S.C. 626(e) in that the action was commenced more than two (2) years subsequent to the said alleged discriminatory practice.
(4) That the Plaintiff failed to file with the Secretary of Labor a notice of intent to file this action within 180 days after the alleged unlawful practice occurred.
(5) That the Plaintiff failed to file with the Secretary of Labor the notice of intent to file this action within 180 days after the alleged unlawful practice occurred.

On January 18, 1979 the District Court granted Sear's Motion to Dismiss and dismissed the Complaint without any hearing.

On January 29, 1979, the plaintiff filed a Motion for Reconsideration alleging the following grounds:

(1) Title VII is remedial legislation, and all doubts should be resolved in favor of the Plaintiff.
(2) The Equal Employment Opportunity Commission determined that the charge was timely filed, and the decision of the EEOC should be given great weight.
(3) If there are material issues of fact in dispute, a Motion to Dismiss should be denied.
(4) Whether or not a continuously maintained illegal employment policy exists is a question of fact to be determined at a trial.

(5) There are some Courts that have held that a demotion is a continuing violation.

(6) If a person's request to be placed in a particular position is rejected because of a discriminatory practice or policy, or for a discriminatory reason, then a discriminatory act occurs at the time the request is made.

(7) Whether or not something is or is not a continuing violation is a question of fact, not a question of law.

(8) Whether something is or is not a continuing violation should be decided at an evidentiary hearing.

(9) The "continuing violation" doctrine constitutes judicial recognition of the overriding importance of Title VII's substantive policies when compared with Act's statute of limitations.

(10) On April 9, 1976, another employee of the defendant Company, Lawrence M. Feldman, was terminated, allegedly for religious discrimination.

(11) The defendant company should be estopped from raising the statute of limitations as a defense.

On February 14, 1979, the District Court denied the plaintiff's Motion for Reconsideration also without a hearing.

The District Court found that "On July 16, 1976, the plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that since July, 1973 and *continuing* (emphasis supplied) thereafter, Sears subjected the plaintiff to discriminatory employment practices because of his religion. The plaintiff sent to the Department of Labor on September 3, 1976 a letter of intent to sue on the basis of age discrimination." The District Court further determined that the filing of a charge of employment discrimination with the EEOC was a jurisdictional prerequisite to any subsequent federal action.

The District Court also stated that "while the EEOC's decision to accept the plaintiff's charge as timely filed is a factor to be weighed in determining the adequacy of the filing . . . Courts have generally made an independent review of the timeliness of the filing of charges with the EEOC." The District Court concluded that Mr. Goldman's Title VII claim was barred for failure to file within 180 days of the alleged discriminatory act. The District Court also determined that the mere allegation of repeated requests and denial of re-transfers does not transform past discriminatory acts into a pattern of discrimination of a continuing nature, and the District Court concluded that there was no present violation. Based upon the same reasoning the District Court also dismissed the ADEA claim for failure to file with the Secretary of Labor within 180 days of the alleged unlawful incident.

The Court of Appeals affirmed, holding that there was no error in the District Court's decision that the charges of discrimination were not timely filed with the appropriate federal agencies. The Court of Appeals accepted the finding of the District Court that "The mere allegation of repeated request and denials of retransfers does not transform past discriminatory acts into a pattern of discrimination of a continuing nature . . . What is required by the *Evans* Case and missing here is the presence of a present violation." The Court of Appeals also found no error in the District Court's resolution of the EEOC's determination of timeliness.

The Court of Appeals determined that in order to state a continuing violation, a complaint must indicate that not only the injury, but the discrimination, is in fact ongoing, and that a continuing violation is not stated if all that appears from the complaint is that a plaintiff continues to suffer from the ongoing effect of some past act of discrimination. The Court of Appeals further determined

that the allegations of repeated requests to be transferred back to the Large Appliance Department were not sufficient as a matter of law to constitute "continuing violations" sufficient to toll the 180 day time period.

Although the Court of Appeals, recognized that there were decisions in other courts that were contrary to its position, to the extent that they were not distinguishable, they chose not to follow them. The Court of Appeals therefore affirmed the decision of the District Court.

Reasons for Granting the Writ

I. The Decision Below Presents a Direct Conflict With the Decision of This and Other Courts and With the Legislative History and Purpose of Title VII.

The question presented by this petition is a critical one, which should be decided by this Court. There is a clear-cut split of authority in the Circuit Courts as well as a great deal of confusion regarding the theory of "continuing violations." If a discriminatory act or policy is "continuing" in nature, then the 180-day time provided for in Title VII would not bar a claim filed after that short 180-day period.

The theory of "continuing violations" is an extremely complicated and confusing theory, essentially because there are a number of different theories under which different Circuit Courts have found violations to exist. It is, therefore, essential for this Court to establish a uniform and consistent policy regarding the concept of "continuing violations."

In *Macklin* v. *Spector Freight Systems, Inc.*, 479 F.2d 979 (D.C. Cir. 1973), the Court held that the claim was timely filed with the EEOC even though it was filed more than 210 days after the alleged discriminatory act.

It was argued that the timely filing provision should be administered solely by the agency, and that once the EEOC has taken jurisdiction over a Complaint and proceeded to launch a serious investigation into the defendant's practices, their decision should be collaterally reviewable in a subsequent Title VII Court action only where the EEOC's assumption of jurisdiction lacks a rational basis. The Court did not rely on the EEOC's finding that it had jurisdiction. The Court went on to state that the jurisdictional requirements that were being applied were not aimed at polished lawyers' pleadings but, rather, at charges brought initially *by laymen* usually unassisted by attorneys. See *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972); and *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 421 (D.C. Cir. 1976); and *EEOC* v. *Nicholson File Co.*, 408 F. Supp. 229 (D. Conn., 1976).

In *Griffin* v. *Pacific Maritime Association*, 478 F.2d 1118 (9th Cir. 1973), the Court affirmed a motion for Summary Judgment on the ground that the claim of discrimination was untimely filed. The claim involved a lay-off, and the Court held that a lay-off, by itself, was not a continuing act. In *Collins* v. *United Airlines, Inc.*, 514 F.2d 594 (9th Cir. 1975), the Court affirmed the dismissal of a claim under Title VII involving the issue of whether or not the violation was a continuing one. The charge of discrimination was filed beyond the time period. The claim, in that case, involved the denial of a request to be reinstated to her old job. The Court held that a request for reinstatement is wholly different from a new application for employment in that it seeks to redress the original termination, and the Court upheld the dismissal of the claim. The implication is that, if she were making a new application for employment, the claim would have been timely. This reasoning would lead to illogical results.

In *Cox* v. *U. S. Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969), the Court of Appeals reversed a District Court dismissal of a claim of discrimination which was filed beyond the appropriate time period. The Complaint alleged that the discrimination was "continuing" and the Court held that was sufficient to survive a dismissal. See *Reeb* v. *Economic Opportunity of Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). *See Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1975).

There are several Circuit Courts which hold that the maintenance of a discriminatory system constitutes a "continuing violation" which can be challenged at any time, regardless of when or whether it has specifically disadvantaged a charging party. The Tenth Circuit has held that an alleged discriminatory system of making promotions solely on the basis of subjective supervisory judgments may be properly challenged even though the plaintiffs in that case failed to demonstrate that they might have obtained specific promotions within the applicable filing period. *Rich* v. *Martin Marietta Corporation*, 522 F.2d 333 (10th Cir. 1975). Similarly, in *Wetzel* v. *The Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975), *cert. den.* 421 U.S. 972 (1975), the Court held that practices of assigning females to segregated jobs from which promotional opportunities were limited constituted "continuing violations," and filing a charge at any time by a present employee would be timely. There are several District Court decisions regarding this viewpoint. See *Burwell* v. *Eastern Airlines, Inc.*, 394 F. Supp. 1361 (D. Va. 1975); *Healen* v. *Eastern Airlines, Inc.*, 8 F.E.P. Cases 915 (D. Ga. 1973); and *Jamison* v. *Olga Coal Co.*, 335 F. Supp. 454 (D. W. Va. 1971).

In *Pacific Maritime Association* v. *Quinn*, 491 F.2d 1294 (9th Cir. 1974), there is some dictum indicating that an ongoing refusal to consider a person for promotion would constitute a continuing violation. There are several Court

of Appeals decisions which stand for the proposition that a challenge to a discriminatory system is untimely if the employment nexus between the employer and the employee has been severed for a period of time which exceeds the charge filing period. See *Olson* v. *Rembrandt Printing Co.*, 375 F. Supp. 413 (D. Mo. 1974); *Younger* v. *Glamorgan Pipe and Foundry Co.*, 310 F. Supp. 195 (D. Va. 1969).

In *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977), the Court found that a failure to promote is a continuing violation. A Complaint which contains allegations that a defendant failed to promote a plaintiff despite continued requests is a sufficient allegation of a continuing pattern of discrimination sufficient to establish the timeliness of the suit and overcome a motion for Summary Judgment or a Motion to Dismiss based upon the timeliness of the Complaint. See *Zagars* v. *Gettysburg College*, 446 F. Supp. 1178 (D. Pa. 1978); and *Vera* v. *Bethlehem Steel Corporation*, 448 F. Supp. 610 (D. Pa. 1978).

In *Corbin* v. *Pan American World Airways, Inc.*, 432 F. Supp. 939 (D. Cal. 1977), the Court held that the plaintiff's claims of a repeated failure to promote and denial of equal pay involved ongoing aspects of the employer-employee relationship, and that a discriminatory act occurred with the receipt of each paycheck, and the payment of each paycheck constituted a continuing violation of the discriminatory practice or policy of failing to promote an otherwise qualified person protected by the provisions of Title VII.

A distinction must be made between a sufficient allegation of continuing violation, and the proof of a continuing violation. The question of whether or not there exists a continuously maintained illegal employment practice or policy is not a question which can be decided as a matter of law but is, rather, a question of fact which must be decided by an evidentiary hearing. The EEOC has determined in this case that the charge of employment discrimi-

nation was timely filed. It must be remembered that Title VII is remedial legislation, and that a Motion to Dismiss based upon the sufficiency of the allegations contained in a Complaint should be rarely granted. See *The Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 421 (1965); and *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Where there are material issues of fact in dispute, a Motion to Dismiss must be denied. See *Windsor* v. *Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975); and *Bethel* v. *Jendoco Construction Corp.*, 570 F.2d 1168 (3rd Cir. 1978).

The EEOC holds that a discriminatory denial of a promotion or a transfer is or can be a "continuing violation." There is a split on this issue in the Circuit Courts and the District Courts and no majority view seems to have been adopted yet. See *Coles* v. *Penney*, 450 F. Supp. 897 (D. D.C. 1978); *Jamison* v. *Olga Coal Co.*, 335 F. Supp. 454 (D. Va. 1971); *Tooles* v. *Kellogg Co.*, 336 F. Supp. 14 (D. Neb. 1972); and, *Cedeck* v. *Hamiltonian Federal Savings and Loan Association*, 551 F.2d 1136 (8th Cir. 1977).

It is crucial for this Court to emphasize the importance of not dismissing Title VII Complaints based upon a narrow reading of Title VII. The time is ripe for another decision by this Court similar to the decision rendered in *Conley* v. *Gibson*, 355 U.S. 41 (1957). In this case, the complaint alleged that "a charge of employment discrimination was filed with the Equal Employment Opportunity Commission within 180 days of the commission of the unfair employment practice. The Complaint also alleged that the plaintiff "made repeated requests to be transferred back to the Large Appliance Department." The legislative purpose of Title VII was to eliminate discrimination against certain classes of persons. In order to give meaning and substance to the remedial purposes of that legislation, this Court should reverse the decision of the Court of Appeals.

II. The Decision Below Presents a Direct Conflict With the Decision of This and Other Courts and With the Legislative History and Purpose of the Age Discrimination Employment Act.

Under the ADEA, a plaintiff prior to 1978, had to file a notice of intent to sue with the Secretary of the Department of Labor either within 180 days of the alleged discriminatory practice or, if in a deferral state, within 300 days of the unlawful practice or 30 days after notification of termination of state proceedings, whichever was earlier. There is a split of authority with respect to whether this notice filing provision is "jurisdictional" or more akin to a Statute of Limitations, subject to tolling and other equitable considerations. In holding that this provision should be subject to equitable tolling, the Court in *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), affirmed by equally divided Court, 424 U.S. 99 (1977), reasoned that "ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the Congressional purpose of ending age discrimination in employment." *Id.* at p. 1260.

There is a split in the Circuit Courts as to whether or not the 180-day period is jurisdictional in nature or whether it is more akin to a Statute of Limitations subject to equitable tolling. This Court should decide the time period within which a charge of discrimination should be treated as a Statute of Limitations subject to equitable considerations and tolling. See *Law* v. *United Airlines, Inc.*, 519 F.2d 170 (10th Cir. 1975); *Powell* v. *The Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974); and, *Hiscott* v. *General Electric Co.*, 521 F.2d 632 (6th Cir. 1975).

III. The Case Raises Vital Questions Concerning Interpretations of Title VII and the ADEA Which Have Not Been, but Should Be Decided by This Court.

The determination by the EEOC that the charge was timely filed should be given controlling weight on a Motion to Dismiss. Title VII and ADEA are remedial legislation, and all doubts should be resolved in favor of the plaintiff. Where there are material issues of fact in dispute, a Motion to Dismiss should be denied.

There is a great deal of confusion among the Circuit Courts as to what a "continuing violation" is for purposes of tolling the short Statute of Limitations.

This Court should clear up that confusion, or there will be a proliferation of law suits attempting to define "continuing violations," and there will be different results in different Circuits. There should be a uniform policy.

This Court should determine that a demotion is a "continuing violation." If a person's request to be placed in a particular position is rejected because of a discriminatory practice or policy or for a discriminatory reason, it should be determined that each time a request is made a discriminatory act occurs.

This Court should also determine that, whether or not a factual pattern constitutes a "continuing violation," should be considered a question of fact and not a question of law. Whether something is or is not a "continuing violation" should be decided at an evidentiary hearing. The "continuing violation" doctrine constitutes significant judicial recognition of the overriding importance of Title VII's substantive policies when compared with the Act's Statute of Limitations. See *Oscar Mayer & Co.* v. *Evans*, U.S. , 47 U.S.L.W. 4569 (May 21, 1979); and, *Bean* v. *Crocker National Bank*, F.2d , 20 F.E.P. Cases 533 (July 13, 1979) (to the same effect for ADEA cases).

Conclusion

Fore the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 78-710-MA

ISADORE GOLDMAN,
PLAINTIFF,
v.
SEARS, ROEBUCK AND COMPANY,
DEFENDANT.

MEMORANDUM AND ORDER
January 17, 1979

MAZZONE, D.J.

The plaintiff commenced this case on March 29, 1978, by filing a complaint alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. §2000e *et seq.* and age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*[1] The relief sought by the plaintiff includes back wages, damages, and the transfer of the plaintiff to his original position of employment with the defendant Sears, Roebuck and Company (Sears).

On the defendant's motion to dismiss, the Court must accept as true the facts which are well pleaded and resolve them in a light most favorable to the plaintiff. See *Conley* v. *Gibson*, 355 U.S. 41, 45-48 (1957). The plaintiff's complaint, including exhibits attached thereto, contains the following allegations: From 1962 until 1972 the plaintiff was employed by the defendant in the large appliance depart-

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[1] Title VII with regard to race, color, religion, sex, or national origin; and the ADEA with regard to age, make it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2(a)(1); 29 U.S.C. §623(a)(1).

ment at the Saugus, Massachusetts store. In 1966, he sustained an injury to his lower back. Following a substantial change in management personnel in 1972, the plaintiff was subjected to discriminatory treatment on account of his religion and age. On July 27, 1973, the defendant transferred the plaintiff to the shoe department, where he made less money.

In 1974, the plaintiff had been under the care of a doctor for severe varicose veins and a cyst. The situation was aggravated by frequent bending and it was recommended by the doctor he try a position that would not require a lot of bending. On May 22, 1974, an orthopedic consultant confirmed the history of his prior back pain and reached a diagnosis of low back sprain and questioned ruptured disc. It was advised that when the plaintiff returned to work, he should get a "change of job description from the Shoe Department back into the Appliance Department where he can do a little more standing." On June 5, 1974, a further orthopedic consultation reported that the plaintiff felt that "his occupation in the shoe department is generally related to exacerbation of low back symptoms." The doctor advised "very strongly that he be placed in an occupational area where he will have to do a minimal amount of lifting, bending, stooping and pulling." Further, the report states "the patient advises me that he was previously working in the Appliance Department at Sears and Roebuck, and he would like to return to this job, as it requires less than the previously described stresses and strains which he undergoes in the shoe department." It was the advice of the doctor "at this time, that this gentleman be considered for transfer to the Appliance Department since working in the shoe department may increase his symptoms and may make him have a prolonged disability and inability to work." And, finally, the doctor expressed "hopefully, arrangements will be able to be made at the place of occupation to place him in the atmosphere where he will feel more confident."

The last consultation took place on July 10, 1974. The report states "It is in my manner of speaking, a reality that this gentleman should be placed in this atmosphere where he can undergo less daily stresses and strains on his low back. This gentleman tells me that there is a certain job in his Co. that would be more suitable to him, namely, as I have mentioned before, working in the appliance department. It is inconceivable to me, at this time, that the Co. would not go along with this simple request. I think they are risking, in this gentleman, that he really has a worked related injuyr, (sic) if he continues with the shoe department."

In 1975 the defendant transferred the plaintiff to the electrical department at the Saugus store.[2] As a result of this transfer, the plaintiff suffered an additional loss of income.

Against this backdrop, on July 16, 1976, the plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that since July, 1973 and continuing thereafter, Sears subjected the plaintiff to discriminatory employment practices because of his religion. The plaintiff sent to the Department of Labor on September 3, 1976 a letter of intent to sue on the basis of age discrimination. After proceedings of the Massachusetts Commission Against Discrimination were suspended, the EEOC found probable cause to believe the defendant had discriminated against the plaintiff. The EEOC notified the plaintiff on March 6, 1978 of the failure of its conciliatory efforts with the defendant, and the plaintiff commenced suit within ninety days of receipt of the EEOC's right to sue letter.

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[2] The plaintiff's memorandum in opposition to the defendant's motion to dismiss refers to August 7, 1974 as the date of transfer to the electrical department.

The defendant has moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, alleging that the action is time barred in that (a) the plaintiff failed to file his religious discrimination charge with the EEOC within 180 days after the alleged unlawful employment practice occurred (42 U.S.C. §2000e-5(e); (b) the plaintiff failed to file his complaint within two years after the alleged discriminatory practice because of age (29 U.S.C. §626(d); (c) the plaintiff failed to file with the Secretary of Labor within 180 days of the alleged discrimination on the basis of age a notice of intent to file this action (29 U.S.C. §626(e)).

I. *Title VII Claim*

42 U.S.C. §2000e-5(e) provides in pertinent part:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . ."

This statutory period of time for filing charges of employment discrimination with the EEOC is considered a jurisdictional prerequisite to any subsequent federal action. *McDonnell Douglas Corp., Inc.*, 411 U.S. 792, 798 (1973) (dictum); *Tarvesian* v. *Carr Division of TRW, Inc.*, 407 F. Supp. 336, 338-339 (D. Mass. 1976). In its determination of reasonable cause, the EEOC found that "The timeliness, deferral, and all other jurisdictional requirements have been met." While the EEOC's decision to accept the plaintiff's charge as timely is a factor to be weighed in determining the adequacy of the filing, see *Cox* v. *United States Gypsum Co.*, 409 F.2d 289, 291 (7th Cir. 1969), courts have generally made an independent review of the timeliness of the filing of charges with the EEOC. See *Belt* v. *Johnson Motor Lines, Inc.*, 458 F.2d 443, 445 (5th Cir. 1972); *Corbin* v. *Pan Am. World Airways, Inc.*, 432 F.Supp. 939, 944 (N.D. Cal. 1977).

This Court concludes that the plaintiff's Title VII claim is barred for failure to file within 180 days of the alleged discriminatory act. By the plaintiff's own pleadings it is alleged that he was transferred into the shoe department in July, 1973 and then transferred to the electrical department in 1975.[3] The two transfers that are the subject of the plaintiff's complaint thus occurred over 180 days prior to the plaintiff's filing of the EEOC charge on July 16, 1976. The plaintiff contends, however, that the transfers, coupled with the denial by the defendant of the plaintiff's repeated requests for re-transfer to the large appliance department, constituted a continuing violation of Title VII.

If the employer's alleged violation is indeed of a continuing nature, the 180-day notice period does not begin to run until the last occurrence of that discriminatory policy or practice. *Acha* v. *Beame*, 570 F.2d 57, 65 (2nd Cir. 1978); *Pacific Maritime Assoc.* v. *Quinn*, 491 F.2d 1294 (9th Cir. 1974); *Belt* v. *Johnson Motor Lines, Inc., supra.* In determining whether there has been continuing discrimination, "the emphasis should not be on mere continuity, the critical question is whether a present *violation* exists." *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). Thus it is not enough that the plaintiff has an ongoing employment relationship with the defendant or that he may suffer the effects of past discrimination in the form of lower pay. See *Kennan* v. *Pan American World Airways, Inc.*, 424 F. Supp. 721, 727 (N.D. Calif. 1976). Several courts have held that a transfer to a lower-paying position does not by itself constitute a continuing violation. As was stated in *Loo* v. *Gerarge*, 374 F.Supp. 1338, 1340 (D. Hawaii 1974):

> "Once a disparaging remark is made, or a transfer is denied, or a demeaning work assignment is given, it is, without more, a completed and isolated act: such practices do not give the plaintiff a perpetual right to file charges before the EEOC."

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[3] See fn. 2.

See also *McReynolds* v. *General Electric Co.*, 406 F.Supp. 1278, 1281 (S.D. Ohio 1976) (plaintiff's claim "crystallized" at the time of the alleged discriminatory downgrading); *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F.Supp. 195, 197 (W.D. Va. 1969) (accord).

The demotion and failure to promote cases cited by the plaintiff generally involve class actions which allege a pervasive policy of discrimination. See e.g., *Jamison* v. *Olga Coal Co.*, 335 F.Supp. 454 (S.D. Va. 1971); *Mack* v. *General Electric Co.*, 329 F.Supp. 72 (D. Pa. 1971). In this case, however, the two transfers appear from the pleadings to be discrete incidents of alleged discrimination. The mere allegation of repeated requests and denial of re-transfers does not transform past discriminatory acts into a pattern of discrimination of a continuing nature. Cf. *Belt* v. *Johnson Motor Lines, Inc., supra.* The requests here for re-transfer to the large appliance department seems to be no more than the plaintiff's informal complaints protesting his removal by the defendant from his original position. However, harsh it may seem, Congress has not provided for suspension of the 180 day limit for filing charges while an employee attempts to obtain relief from his employer through his own efforts. See *Adams* v. *Bailar*, 426 F.Supp. 263, 265 (E.D. Va. 1976). Cf. *International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (utilization of grievance procedures does not toll Title VII limitations period). What is required by the *Evans* case and missing here is the presence of a present violation.[4]

[4] The EEOC's Interpretative Memorandum released July 12, 1977, 46 U.S.L.W. 2028 (July 19, 1977), construed the *Evans* case to hold only that discharges are not continuing violations. The EEOC concluded that the *Evans* case does not affect the continuing violation principle with respect to other employment practices, particularly allegations of discriminatory denial of transfers or promotions where the policy accounting for the denial remains in effect within 180 days of the charge.

Thus, the plaintiff's claim under Title VII is time barred for failure to file within 180 days of the alleged discriminatory incident.

II. ADEA Claim

Section 7(d) of the ADEA, 29 U.S.C. §626(d), provides in pertinent part:

> No civil action may be commenced by an individual under this section until the individual has given the Secretary [of Labor] not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred.

Such notice has been held to be jurisdictional in nature. *Law* v. *United Air Lines, Inc.*, 519 F.2d 170 (10th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1971).[5] This requirement serves to afford the Department of Labor an opportunity to take appropriate action while the complaint is still fresh and to give early notice to the potential defendant.

Because the plaintiff's age discrimination claim is based on the same incidents discussed above in relation to the

Even if the defendant here transferred the plaintiff for discriminatory reasons, there is no indication that such a discriminatory policy has continued. Indeed, the medical exhibits attached to the plaintiff's complaint, extensively summarized above, suggest that the plaintiff continuously requested and was granted a reasonably prompt transfer from the shoe department because of his injured back.

[5] In *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 47 U.S.L.W. 3221 (Oct. 3, 1978), the Court held that under the ADEA notice of intent to sue within 180 days is not jurisdictional but is merely in the nature of a statute of limitations and therefore subject to possible tolling and estoppel. Even if the 180-day period is subject to tolling and estoppel, the plaintiff has plead no facts to warrant the application of such equitable doctrines.

EEOC claim, the plaintiff's ADEA claim should be dismissed for failure to file with the Secretary of Labor within 180 days of the alleged unlawful incident. Accordingly, the defendant's motion to dismiss is granted.

SO ORDERED.

(s) A. David Mazzone
United States District Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 79-1154

ISADORE GOLDMAN,
PLAINTIFF, APPELLANT,
v.
SEARS, ROEBUCK & COMPANY,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.

Frederick T. Golder and *Shulman & Golder* on brief for appellant.

Carl K. King, Gary R. Greenberg, Goldstein & Manello, Joseph M. Kehoe, Jr., and *Robert F. Maxwell* on brief for appellee.

October 25, 1979

Campbell, *Circuit Judge*. This appeal is from the district court's dismissal of an employment discrimination action. The court held that the charges of discrimination were not timely filed with the appropriate federal agencies. We find no error.

The complaint in the instant action alleged substantially the following: After working in the large appliance department of Sears, Roebuck's store in Saugus, Massachusetts from 1962-72, appellant was subjected to harassment and other discriminatory treatment following a management change in 1972. On or about July 27, 1973, he was told he was not a "professional salesman" and was trans-

ferred to the store's shoe department at a substantial loss of income. This transfer was made even though in 1966 he had injured his lower back, an injury Sears knew would be aggravated by employment in the shoe department, and was in fact so aggravated. Sometime in 1975, appellant was transferred from the shoe department to the store's electrical department, at a further loss of income. Appellant made repeated requests to be transferred back to the large appliance department, "but the defendant Sears has refused." In consequence,

> "The plaintiff alleges that in transferring him out of the large appliance department, transferring him to the shoe department, and then transferring him to the electrical department, the defendant discriminated against the plaintiff solely because of his religious beliefs (Jewish) and because of his age . . . ."

Appellant invoked Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (religion),[1] Title 28 U.S.C. §§ 1337 and 1343, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626.[2] Appellant specifically asserted in the complaint that he had complied with all conditions precedent under 42 U.S.C. § 2000e-5, in that, *inter alia,* he had filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the occurrence of the unfair employment practice. The complaint goes on to state that the discrimination charge was filed with EEOC on July 16, 1976. On October 13, 1977 the EEOC allegedly found reasonable cause to believe that appellant's charge was true and invited the parties "to join with it in a collective effort toward a just resolution of the matter." On March 6, 1978 appellant was said to have been notified by the EEOC that it had been unable, through its informal methods, to reach a settlement with appellee, that it would not itself bring suit against appellee, and that appellant was thus entitled to sue appellee under Title VII if the suit was commenced within ninety days of receipt of the notification. Appellant commenced the present action on March 29, 1978.

Appellee moved to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), and for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), on the grounds that appellant had not filed his charge of religious discrimination with the EEOC within the time required by Title VII, 42 U.S.C. § 2000e-5(e),[3] nor had he filed his charge of age discrimination with the Secretary of Labor within the time required by the ADEA, 29 U.S.C. § 626(d)(1).[4]

Attached as an exhibit to a memorandum accompanying

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[1] 42 U.S.C. § 2000e-2(a)(1) states:

> "It shall be an unlawful employment practice for an employer—
>
> . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

[2] 29 U.S.C. § 626(a)(1) states:

> "It shall be unlawful for an employer—
>
> . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age; . . ."

[3] 42 U.S.C. § 2000e-5(e) states in part:

> "A charge under this section shall be filed [with the EEOC] within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."

[4] 29 U.S.C. § 626(d) states in part:

> "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; . . ."

the motion to dismiss was a copy of the charge appellant had filed with the Secretary of Labor pursuant to 29 U.S.C. § 626(d).[5] The copy showed that the charge had been filed with the Secretary on September 3, 1976. Although not included in the complaint, the correctness of this date does not appear to have been disputed. Appellant filed a memorandum of law in opposition to the motion to dismiss.

The district court granted appellee's motion to dismiss the complaint. The court thought it clear, from the face of the complaint and the copy of the charge filed with the Secretary of Labor, that appellant's Title VII and ADEA claims were time-barred for failure to file charges of religious and age discrimination with the responsible agencies within the statutorily required time periods. Both Title VII and the ADEA required appellant to have filed his charge "within 180 days after the alleged unlawful practice occurred." *See* notes 3 and 4 *supra*. According to the complaint the latter of the two demotions (*viz.* to the electrical department) occurred "sometime in 1975." Appellant filed his charge of religious discrimination with the EEOC on July 16, 1976 and his charge of age discrimination with the Secretary of Labor on September 3, 1976. Thus in neither case was the charge filed within 180 days of the two unlawful practices specifically alleged.

Appellant argued in opposition to the motion to dismiss that because the complaint alleged he "made repeated requests to be transferred back to the large appliance department, but [appellee] has refused," it stated continuing violations of Title VII and the ADEA. On this theory, the unlawful practices continued indefinitely and the running of the 180 days was not triggered by the final demotion in 1975.

The district court disagreed. The court said,

"[i]n determining whether there has been continuing

[5] *See* note 4 *supra*.

> discrimination, 'the emphasis should not be on mere continuity; the critical question is whether a present *violation* exists.' *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977) . . . In this case . . . the two transfers appear from the pleadings to be discrete incidents of alleged discrimination. The mere allegation of repeated requests and denials of retransfers does not transform past discriminatory acts into a pattern of discrimination of a continuing nature. . . . What is required by the *Evans* case and missing here is the presence of a present violation."

After dismissal of the complaint, appellant unsuccessfully moved for reconsideration, arguing *inter alia,* that the 180-day period should have been tolled until April 1976 (which would render his agency filings timely) because it was not until then, when another employee was allegedly terminated due to religious discrimination, that appellant became "fully convince[d]" his transfers were due to discrimination.[6] A timely appeal was taken from the orders dismissing the complaint and denying the motion for reconsideration.

On appeal appellant again contends that his complaint sets forth a continuing violation, thus avoiding any necessary inference that he was too late in filing charges with the agencies. He argues also that the district court did not give due weight to the EEOC's own determination that his charge was timely filed. As a final argument, appellant contends that because Massachusetts is a deferral state within the meaning of 29 U.S.C. § 633(b), he had 300, rather than 180, days following the "alleged unlawful practice"

[6] As these alleged facts were not included in appellant's complaint or in an amended complaint, they are not part of the record and cannot be considered in determining whether the complaint states a timely Title VII or ADEA claim. *O'Brien* v. *DiGrazia,* 544 F.2d 543, 545 (1st Cir. 1976), *cert. denied sub nom. O'Brien* v. *Jordan,* 431 U.S. 914 (1977).

within which to file his age discrimination claim with the Secretary of Labor. *See* 29 U.S.C. § 626(d)(2).

Taking the above arguments in reverse order, we decline to entertain the "deferral state" contention, as it was neither raised nor considered below. *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1978).[7]

The next contention—that dispositive weight must be given the EEOC's determination of timeliness—is properly before us, but we find no error in the district court's resolution. In a letter notifying appellant that it had found reasonable cause to credit his charge of employment discrimination, the EEOC stated that "the timeliness, deferral, and all other jurisdictional requirements have been met." Appellant charges the district court with having "completely ignored" this statement. The court did not, however, ignore the EEOC's position. It stated in its opinion that the Commission's determination was a factor to be weighed, but the courts have generally made an independent review of the timeliness of the agency filing. There is ample precedent for this approach. *See, e.g., Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 986 (D.C. Cir. 1973); *Corbin* v. *Pan American World Airways, Inc.*, 432 F. Supp. 939, 944 (N.D. Cal. 1977); *but see Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1014 n.6 (5th Cir. 1971) (dicta). Certainly when the allegations in the complaint indicate that a timely claim was not filed, the agency's boilerplate statement to the contrary,

[7] This is not a case where a serious miscarriage of justice is likely to occur unless we entertain the issue. Although the complaint states that the second demotion occurred "sometime in 1975," in his opposition to the motion to dismiss, appellant states that "according to the employment records of the defendant the day of that transfer was August 7, 1974." If the second demotion occurred in 1974 or even in the first half of 1975, the charge filed with the Secretary of Labor would have been untimely under either the 300-day or the 180-day statutory period.

issued without supporting reasons, does not effect a valid dispensation of the statutory requirement.

We turn now to appellant's primary contention—that because the complaint supposedly states claims of continuing violations of Title VII and the ADEA, the period for filing agency complaints did not commence at the time of plaintiff's last transfer in 1975 but remained indefinitely open. Under this theory, plaintiff's alleged repeated requests to be retransferred to the large appliance division, followed by Sears' alleged refusals to honor these requests, constituted evidence of the ongoing nature of the violations, which arguably continued up to and through the filing of all charges. Courts have held that if a Title VII or ADEA violation is of a continuing nature, the charge of discrimination filed with the appropriate agency may be timely as to all discriminatory acts encompassed by the violation so long as the charge is filed during the life thereof or within the statutory period (*e.g.*, 180 days) which commences upon the violation's termination. *See, e.g., In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1148-49 & n.12 (7th Cir. 1978); *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 348 n.15 (10th Cir. 1975); *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 635 (6th Cir. 1975).

To state such a continuing violation, however, a complaint must indicate that not only the injury, but the discrimination, is in fact ongoing. The district court held that that hurdle was not surmounted here, and we agree. A continuing violation is not stated if all that appears from the complaint is that the plaintiff continues to suffer from the ongoing effects of some past act of discrimination.

United Air Lines, Inc. v. *Evans,* 431 U.S. 553, 558 (1977).[8] As we have said, moreover, "[c]omplaints based on civil rights statutes must do more than state simple conclusions; they must at least outline the facts constituting the alleged violation." *Fisher* v. *Flynn,* 598 F.2d 663, 665 (1s Cir. 1979); *accord, Martin* v. *New York Department of Mental Hygiene,* 588 F.2d 371, 372 (2d Cir. 1978); *cf. Coates* v. *Illinois State Board of Education,* 559 F.2d 445, 447, 449 (7th Cir. 1977). If plaintiff meant to claim that the later refusals formed part of a continuous chain of misconduct, it was incumbent upon him to allege facts giving some indication that the later refusals were themselves separate civil rights violations.

Far from so doing, plaintiff alleged only that the actual transfers constituted statutory violations. Thus the complaint states that "in transferring him out of the large appliance department, transferring him to the shoe deparment, and then transferring him to the electrical department, the defendant discriminated against the plaintiff solely because of his religious belief (Jewish) and because

[8] In *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977), plaintiff, a flight attendant, was forced to resign when she married in 1968. She was rehired in 1972 but treated for seniority purposes as if she were an entirely new employee. She repeatedly requested her employer to credit her with pre-1972 seniority but to no avail. In 1973 she filed a charge of sex discrimination with the EEOC. The district court dismissed her complaint as time-barred. The Supreme Court affirmed, noting *inter alia* that a continuing violation was not stated because although plaintiff's injury was ongoing, the cause of the injury was not. The seniority system was not discriminatory because it treated all employees who were, for whatever reason, terminated in 1968 and rehired in 1972 the same. The only act in violation of Title VII was plaintiff's forced resignation in 1968. Thus, although the seniority system gave present effect to a past act of discrimination, since the discrimination itself was not ongoing the violation of Title VII was not a "continuing violation" for purposes of extending the filing period beyond 90 days from the date of plaintiff's resignation. (In 1972, 42 U.S.C. § 2000e-5(e) was amended to enlarge the filing period from 90 to 180 days.)

of his age, and that, therefore, the defendant committed an unlawful employment practice against the plaintiff in violation of Title 42 U.S.C. Section 2000e-5 and Title 29 U.S.C. Section 626." While this sentence is preceded by reference to plaintiff's repeated unavailing requests to be transferred back to the large appliance department, Sears' alleged refusals to honor these requests are not pleaded as separate violations of the statutes. It is not said when these refusals occurred, nor are any facts stated indicating that the refusals to retransfer (as distinct from the original transfers) were motivated by a discriminatory animus. There is, for example, no indication that when the refusals were made a position was open in the large appliance department, or would then have been opened but for discrimination against appellant. *See Moore* v. *Sunbeam Corp.,* 459 F.2d 811, 828 (7th Cir. 1972). A basic element of a Title VII (and ADEA) claim is that the alleged discrimination be a "determinative factor" in the injury plaintiff suffered. *Sweeney* v. *Board of Trustees of Keene State College,* No. 79-1112, Slip op. at 3 (1st Cir. August 21, 1979); *see also Fisher* v. *Flynn,* 598 F.2d at 665. To hold, on such non-specific allegations that the complaint states more than the discrete violations specifically pleaded, would be, in effect, to negate the statutory time requirements for bringing charges. Under the construction urged by appellant, every demotion could be turned into a continuing violation merely by pleading that plaintiff had continued to protest unsuccessfully. We are not persuaded that Congress intended such an easy means of circumventing the 180-day requirements.

The three cases which appellant cites in support of his contention that the complaint states continuing violations are largely distinguishable, and to the extent not, we decline to follow them. In *Vera* v. *Bethlehem Steel Corp.,* 448 F. Supp. 610, 615 (M.D. Pa. 1978), the court found

that the complaint "refers to discriminatory policies which were of a continuing nature" as being the cause of plaintiffs' assignment to, and failure to be advanced from, their positions as unskilled laborers. Thus, the complaint stated that the discrimination, as well as the injury, was ongoing. Even so, we need not decide if these bare conclusory allegations, standing alone, would be adequate in our view to state a viable claim of a continuing violation. *See* Rule 12(b)(6), Fed. R. Civ. P.; *see Fisher, supra.*

In *Zagars* v. *Gettysburg College,* 446 F. Supp. 1178, 1178-79 (M.D. Pa. 1978), summary judgment for defendant was denied because plaintiff's affidavit alleged that she was repeatedly refused a promotion "which she was originally promised." The district court held that this allegation raised a question of fact as to whether the discrimination against plaintiff was ongoing. The allegation that she was at one time promised the position to which she was seeking a promotion provides some evidence that the repeated refusals to promote plaintiff were due to wrongdoing. We do not decide whether, even so, we would have found this allegation sufficient by itself to imply that the wrongdoing was continuing.

In *Corbin* v. *Pan American World Airways, Inc.,* 432 F. Supp. 939, 944 (N.D. Cal. 1977), the complaint stated that when plaintiff repeatedly but unsuccessfully requested a promotion, the position he sought was available. Plaintiff also alleged that in his present job he was required to perform the same work as six non-black employees but for less pay. These allegations read together were found to make out a claim of ongoing discrimination. The court held that "[v]iewing the allegations in the light most favorable to plaintiff, discrimination occurs with the receipt of each pay check and the award of each Lead Clerk opening." While the court may have been right in those circumstances, the instant facts are plainly different.

We find no merit in appellant's argument that the district court was engaging, improperly, in fact-finding when it allowed the motion to dismiss. The court, taking all the pleaded facts as true, could read no reasonable conclusion other than that the claims were untimely. Likewise, we find no merit in appellant's argument that whether appellee's refusals were due to ongoing discrimination was a matter for discovery, and did not have to be alleged. In *Fisher* we held that lack of discovery is not an excuse for failing to allege in the complaint facts sufficient to outline the bare bones of the Title VII claim. 598 F.2d at 665.[9]

The judgment of the district court is affirmed.

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[9] The district court found that the 180-day period for filing a charge with the EEOC is a jurisdictional prerequisite to a Title VII action. We need not, and thus do not, reach this issue. Our holding is that appellant's employment discrimination charges were not filed with the appropriate agencies within the statutorily required time periods and, even if these periods could be tolled in some circumstances (a question we do not reach today), there is no reason for tolling them in the present case.

Neither the district court nor this court reached the issue whether appellant's ADEA claim was barred by the two year statute of limitations. *See* 29 U.S.C. §§ 255(a) & 626(e)(1).

APPENDIX C

TITLE VII OF CIVIL RIGHTS ACT

* * *

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Section 703(a). It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[1972 Amendments: Section 703(a)(2) was amended by P.L. 92-261, effective March 24, 1972, and added the words "applicants for employment".]

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which

would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor, organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provisions of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by

a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an

employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer,

referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of

its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and

twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice

or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental

agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or

temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at

the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect tc civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (j) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

APPENDIX D

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), as amended (1978)

* * *

Prohibition of Age Discrimination

Sec. 4(a). It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

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Recordkeeping, Investigation and Enforcement

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Sec. 7(c)(1). Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

Sec. 7(c)(2). In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

Sec. 7(d). No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Sec. 7(e)(1). Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

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Age Limitation

Sec. 12(a). The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than 70 years of age.

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Federal-State Relationship

* * *

Sec. 14(a). Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

Sec. 14(b). In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days

after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.